

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BRK:TL-N-5942-00

REGole

date: NOV 29 2000

to: Large and Mid-Size Business Division
Territory Manager (Group 1102 - Financial Services
And Healthcare)
Attn: William Rogers

from: Associate Area Counsel (CC:LMSB:FSH:BRK)

subject: [REDACTED]

EIN: [REDACTED]

EARLIEST STATUTE OF LIMITATIONS: [REDACTED]

This is in further response to your request for assistance in drafting a summons to the above-referenced taxpayer-corporation for employment records. Under routine Counsel procedures, we forwarded this case to our National Office for their review of the conclusions rendered in our memoranda dated November 21, 2000. The National Office generally concurs with the advice previously rendered by our office, and you should proceed with the issuance of the proposed summons at this time.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Based upon our conversations with the National office, we are clarifying the following points:

First, the procedures set forth in our prior memorandum apply to service of the taxpayer-corporation's internal custodian of records. Different procedures apply to third party recordkeeper summonses.

In addition, we refer you to IRM 52(12)7.2, which states that personal service on a corporation is always preferable as a matter of procedure. The Service directs agents to use personal service on corporations.

Finally, we omitted the word "record" after "personnel" on the second line of page 4 of the November 21, 2000 memorandum.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702. We are closing our files at this time.

JODY TANCER
Associate Area Counsel
(CC:LM:FSH:BRK)

By:


ROSE E. GOLE
Attorney

Office of Chief Counsel
Internal Revenue Service

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subject: [REDACTED]

EIN: [REDACTED]

EARLIEST STATUTE OF LIMITATIONS: [REDACTED]

This responds to your request for assistance in drafting a summons to the above referenced taxpayer.

DISCLOSURE STATEMENT

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ISSUES

Our office considered the following issues:

1. Whether the summons should be issued to the taxpayer corporation, or to the custodian of the taxpayer's records;
2. Whether personal service of the summons is required;
3. Whether computerized employment records may be summonsed; and
4. Whether the examination team should initiate an examination of related trust fund issues?

FACTS

The facts, as we understand them, are as follows: You have requested copies of payroll records, forms W-4 and other related documents in connection with an audit of the above-referenced taxpayer for the years [REDACTED] through [REDACTED]. The records are for the purpose of determining whether monies treated as expense reimbursements should be re-characterized as wages for undocumented overtime. This is the only issue remaining in the case.

Information document requests ("IDRs") for the payroll register and related information were issued in [REDACTED] and [REDACTED]. The examination team copied the relevant payroll register for approximately three weeks. However, the taxpayer refused to allow the agents to continue copying the records. The taxpayer has refused to produce the requested information.

(b)(3)

[REDACTED]

DISCUSSION

Issue 1:

The proposed summons properly describes the taxpayer with its full legal name and can be issued as drafted. Alternatively, you may wish to consider summoning the custodian of records for the taxpayer if you believe there will be an issue relating to the possible destruction of the relevant records. For example, it may be necessary to question the recordkeeper about the taxpayer's record retention, the types of personnel records maintained by the taxpayer's personnel, or other sources for

obtaining the relevant employee records. If you wish to summons the custodian of records, identify the custodian by name and title or official status. For example, "X, as Custodian of Records, [REDACTED]." If you do not know the name of the recordkeeper, the summons should state, "Custodian of records, [REDACTED]."

Issue 2:

I.R.C. § 7603 provides generally that service of a summons shall be made "by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode." Service on a corporation can only be made by personal service. IRM, Handbook No. 109.1, § 3.2; Handbook No. 5.17, § 6.7. Also see N.Y.C.P.L.R. §311(1) (McKinney, 1990). If the summons is directed to the custodian of records, it should be served personally on the custodian. If the summons is directed to the corporation, service should be made upon a corporate officer, director, managing agent, or other person authorized to accept service of process for the corporation. *Supra*. The individual officer or custodian, whichever individual you deem appropriate to serve, may be served at the corporation's place of business or wherever he or she may be found. The summons cannot be left with a secretary of the officer or a receptionist of the corporation.

Issue 3:

Code § 7602(a)(1) provides generally that the Secretary is authorized to "examine any books, papers, records, or other data, which may be relevant or material to such inquiry." The IRS is entitled to summon material if it satisfies a broad standard for relevancy. United States v. Powell, 379 U.S. 48, 57-58 (1964). Although there is only limited case law defining what constitutes "records or other data" within the meaning of I.R.C. § 7602, we believe the Service is authorized to summons computerized personnel records. See United States v. Norwest Corp., 116 F.3d 1227 (8th Cir. 1997) (holding that tax related software falls within the scope of I.R.C. § 7602);¹ United States v. Euge, 444 U.S. 707(1980) (Enforcing a summons for handwriting exemplars).

¹ The holding of Norwest, *supra*., has been superseded by I.R.C. § 7612, added by P.L. 105-206 (IRS Restructuring and Reform Act of 1998), which provides procedures for summonses for "tax-related computer software source codes." These are not the type of records you require. In addition, I.R.C. § 7612(b)(2)(B) further excepts computer source code information developed primarily for internal use. The computerized personnel records are internal documents of the taxpayer. Hence the relevant personnel data falls outside the scope of I.R.C. § 7612.

Accordingly, it would be proper to amend your proposed summons to request computerized personnel if you wish to obtain this information.

Issue 4:

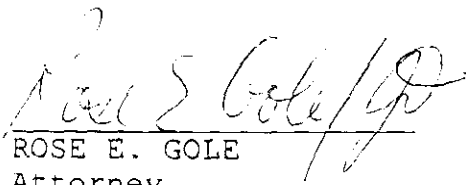
Should you obtain information, pursuant to the above-stated summonses, indicating that the taxpayer incorrectly characterized overtime wages as reimbursed employee expenses, then you intend to assert employment tax liability against the taxpayer for unpaid Form 940 and Form 941 employment taxes for the years and periods in issue. Based on such, we believe that this is an appropriate stage in your investigation for you to attempt to obtain the names and addresses of individuals responsible for the payment of these employment taxes during the years and periods in issue. This information will be helpful to you in the event that you decide to refer this case for development of the trust fund recovery penalty under I.R.C. section 6672.

You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this opinion to the National Office for review. That review might result in modifications of the conclusions herein. You should not issue a summons based on this advice until you receive a supplemental memorandum wherein we finalize our opinion. We will inform you in writing of the result of the review as soon as we hear from the National Office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
(CC:LM:FSH:BRK)

By:


ROSE E. GOLE
Attorney